

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

MELISSA SOLANO and CEIL STEARMAN
Plaintiffs,
- against -
ROLLING STONE L.L.C.,
Defendant.

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08 CV 3909

Judge Joan Humphrey Lefkow

Magistrate Judge Valdez

**DEFENDANT ROLLING STONE LLC'S LOCAL RULE 56.1
STATEMENT OF UNDISPUTED MATERIAL FACTS**

Defendant Rolling Stone LLC (“Rolling Stone” or “Defendant”) respectfully submits the following statement of undisputed material facts in accordance with Local Rule 56.1(a)(3):

I. THE PARTIES

1. Rolling Stone is the owner and publisher of the renowned magazine *Rolling Stone*. Among other things, *Rolling Stone* published a regularly recurring column called “On The Web” in the “Internet” section of the magazine (the “Column”), which featured a series of websites selected by the editors of the magazine which they believe might be of interest to *Rolling Stone*’s readers. Declaration of Deborah Dragon, sworn to August 7, 2008 (“Dragon Decl.”).¹

2. Plaintiffs Melissa Solano (“Solano”) and Ceil Stearman (“Stearman”) are residents of Cook County Illinois. Complaint, ¶ 3, Ex. A to Declaration of Elizabeth A. McNamara, sworn to August 7, 2008 (“McNamara Decl.”).

1 Declarations and exhibits thereto cited in this statement have been submitted in connection with Rolling Stone's Rule 12(b)(6) Motion to Dismiss or, in the Alternative, for Summary Judgment.

II. JURISDICTION AND VENUE

3. This is a civil action in which the United States District Court has original jurisdiction under the provisions of 28 U.S.C. § 1332 because Plaintiffs and Defendant are citizens of different states and because the alleged amount in controversy exceeds \$75,000. On July 9, 2008, the matter was removed, pursuant to 28 U.S.C. §§ 1441, 1446 and 1332, from the Circuit Court of Cook County, Illinois. Notice of Removal, Docket Entry 1.

4. Pursuant to 28 U.S.C. § 1441(a), the United States District Court for the Northern District of Illinois is the federal district court for the district embracing the place where the State Court suit is pending. Notice of Removal, Docket Entry 1.

III. BACKGROUND ON PLAINTIFFS

5. Until recently, Plaintiffs were among the “babes” featured on a bachelor party service by the name of Next Plateau Chicago (“NPC”). McNamara Decl., Ex. C.

6. NPC (available at <http://www.nextplateauchicago.com>) describes itself as “Chicagoland’s premiere bachelor party service” with a specialty in “2 girls bi-sexual toy shows.” Its website advertises that “our girls will perform for you intimately with toys, fruit, etc. all the while keeping the bachelor apart [sic] of the show.” McNamara Decl., Ex. C.

7. At NPC, Plaintiffs used the professional names of “Brook” and “Ashley” and advertised that they perform both together and individually. “Brook” and “Ashley” each had their own page on the NPC website where they display photos of themselves topless and/or fully nude. McNamara Decl., Ex. C.

8. In one photo on the NPC site, “Ashley” appears fully nude reclining on a bed. In another “Brook” appears topless in a pose strikingly similar to that in the Photograph. The Ashley and Brook pages each emphasize their willingness to engage in an “amazing” or “wild and crazy” 2-girl show. “Ashley” states on her page that “I do a wild and crazy 2-girl show with

my girlfriend Brook we were both featured in the rolling stone magazine together.” McNamara Decl., Ex. C.

IV. PLAINTIFFS’ PHOTOGRAPH APPEARS ON WWW.HOTCHICKSWITHDOUCHEBAGS.COM

9. A photograph of Plaintiffs (the “Photograph”) first appeared on the popular website www.hotchickswithdouchebags.com beginning on or about November 29, 2006 (the “Website”). The Photograph shows only Plaintiffs’ profiles – their full faces and bare breasts are not visible – and does not display any other recognizable traits, characteristics, or personal effects. The Photograph does not readily identify Plaintiffs. Dragon Decl., Ex. D.

10. The Website describes itself as providing “pictures of hot chicks with total and complete douchebags.” Dragon Decl., Ex. C. The founder of the popular Website states on the homepage: “this site is all about poking fun at douche-scrotos and the hotties who love them . . . If you’re in a photo and upset about the verbal smackdown you morally and spiritually deserve, email me and I’ll take down the photo.” *Id.* A book featuring selected photographs and commentary from the Website was recently published by a division of Simon & Schuster. McNamara Decl., Ex. D.

11. On or about November 29, 2006, a large version of the Photograph was posted on the Website as “HCwD of the Week”. Comparing the photograph to others posted on the site, the Website comments that the Photograph of Plaintiffs “wins hands-down this week . . . This is mainly based on the juggernaut strength of the hotties in question. Even though you cannot see their faces, they are clearly keen on running around naked, which makes them both stars in my book.” Dragon Decl., Ex. D.

12. While the Photograph was removed from the Website well after *Rolling Stone's* publication, Plaintiffs do not deny – nor could they – that the Photograph had been prominently featured on the Website. Dragon Decl., ¶ 7; McNamara Decl., Ex. A, *passim*.

V. REPUBLICATION OF THE PHOTOGRAPH IN A COLUMN IN ROLLING STONE MAGAZINE

13. The “On The Web” editorial column appearing in the “Internet” section of the May 31, 2007 issue of *Rolling Stone* magazine (the “Column”) featured five different websites selected by *Rolling Stone's* editors that they believed would be of interest to the magazine's readers. One of the sites featured was hotchickswithdouchebags.com. The Column, which appeared on page 42 of the magazine and occupied about a quarter of a page, included three photographs to illustrate the contents of several of the websites discussed. Dragon Decl., Ex. A.

14. The first website discussed in the Column is comedian Will Ferrell's website, “funnyordie.com”. According to the Column, the site provides video clips by the comedian and “users vote on which clips are the most gut-busting and which should languish in comedy hell.” The Column suggests that its readers “check out the clip” where the popular children's cartoon character Dora the Explorer receives a telephone call from Alec Baldwin (an apparent spoof on a notorious profanity-laden telephone message Alex Baldwin left for his real-life daughter). To illustrate the website's content, photographs of Will Ferrell, Alex Baldwin and a rendering of Dora the Explorer appear along side the Column's description of the website. Dragon Decl., Ex. A.

15. The last website featured in the Column is “hotchickswithdouchebags.com.” Titled “Say Cheesy,” the item notes that “the site name says it all: photos of gelled-and-tanned dudes and hot babes mugging it up for the camera.” A small version of the Photograph (approximately one inch by one inch) appears next to the description of the Website as an

example of the material that can be found on the site. Plaintiffs appear topless, with their hands covering their breasts, and kissing a man standing in between them. While their full faces are not visible and are further obscured by some blurring, the Photograph was selected to illustrate what can be found on the Website, namely “hot babes mugging it up for the camera.” Dragon Decl., ¶ 8.

16. The photos of Plaintiffs on the NPC site are larger and more revealing than the Photograph republished in *Rolling Stone*. McNamara Decl. as Ex. C.

17. Rolling Stone’s records document that the on-sale date of the May 31, 2007 issue of *Rolling Stone* (i.e., the date of first publication) was May 18, 2007. More than 1,700,000 copies of the issue were distributed nationally to retail outlets and subscribers. Declaration of Camp Shropshire, sworn to August 7, 2008 (“Shropshire Decl.”), ¶ 11.

18. By May 18, 2007, newsstands across the country (including Chicago) received the issue and upon receipt promptly placed the magazine on sale. Accordingly, based on Rolling Stone’s records, the issue dated May 31, 2007 was widely available to the public no later than May 18, 2007 and was actively sold nationally and in Chicago beginning on May 17, 2007. Shropshire Decl., ¶¶ 9-10.

VI. THE PRESENT ACTION

19. On May 24, 2008, Plaintiffs filed the complaint in this action in the Law Division of the Circuit Court of Cook County. The complaint purports to allege that Defendant’s publication of the Photograph (1) placed Plaintiffs in a false light and (2) constituted an unauthorized commercial use of their likeness in violation of the Illinois Right to Publicity Act, 765 ILCS 1075/60 (the “Act”). Plaintiffs allege that publication of the Photograph was “injurious to [their] good name[s] and reputation[s], caused them “mental suffering and anguish,” and deprived them of the “value” of their images; Plaintiffs seek damages to

compensate them for the aforesaid injuries “well in excess” of the jurisdictional limit of \$30,000. McNamara Decl., Ex. A.

20. On July 9, 2008, Defendant removed the action to this Court. *Id.*, ¶ 2.

21. On receipt of the Complaint, Rolling Stone promptly put Plaintiffs on notice, by letter to their counsel dated June 18, 2008, that their legal claims were untenable as a factual and legal matter. McNamara Decl., Ex. B.

22. In response to Defendant’s letter, counsel for Plaintiffs confirmed by telephone and e-mail that Plaintiffs would be amending their complaint to drop the “false light” claim, leaving only Plaintiffs’ claim brought pursuant to the Act. As of this date, however, Plaintiffs have not withdrawn or amended their Complaint. McNamara Decl., ¶ 3.

Respectfully submitted,

ROLLING STONE, LLC

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Dated: August 8, 2008

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CERTIFICATE OF SERVICE

This is to certify that I have this date caused to be served a true and correct copy of the foregoing ***Defendant Rolling Stone LLC's Local Rule 56.1 Statement Of Undisputed Material Facts*** on:

Steven A. Sigmond
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via messenger delivery and via electronic mail on August 8, 2008.

/Steven L. Baron/
Steven L. Baron